106 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

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| Colorado River Commission of Nevada | Docket No. EL03-184-000 |
| Constellation Power Source, Inc. | Docket No. EL03-185-000 |
| El Paso Merchant Energy, L.P. | Docket No. EL03-187-000 |
| Eugene Water & Electric Board | Docket No. EL03-188-000 |
| Idaho Power Company | Docket No. EL03-189-000 |
| Koch Energy Trading, Inc. | Docket No. EL03-190-000 |
| MIECO, Inc. | Docket No. EL03-192-000 |
| PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing, Inc.) | Docket No. EL03-197-000 |
| Sempra Energy Trading Corporation | Docket No. EL03-201-000 |
| TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc. | Docket No. EL03-202-000 |

ORDER ON MOTIONS TO DISMISS SHOW CAUSE PROCEEDINGS

(Issued January 22, 2004)

## Introduction

1. In this order, we grant and deny motions to dismiss certain dockets instituted in the show cause proceeding established by the Partnership Gaming Order. [1]

[1] Enron Power Marketing Inc., et al., 103 FERC ¶ 61,346 (2003), reh'g denied, 106 FERC ¶ 61,024 (2003) (Partnership Gaming Order).

## Background

### Partnership Gaming Order

2. In the Partnership Gaming Order, the Commission explained that, based on the Final Report submitted by Commission Advisory Staff, and evidence and comments submitted by market participants, it appeared that Enron Power Marketing, Inc. and Enron Energy Services Inc. (collectively, Enron) and a number of entities identified in the order (collectively, Partnership Entities) worked in concert through partnerships, alliances or other arrangements (jointly, Partnerships) to engage in activities that constitute gaming and/or anomalous market behavior (Gaming Practices) in violation of the California Independent System Operator Corporation's (ISO) and the California Power Exchange's (PX) tariffs during the period of January 1, 2000 to June 20, 2001.[2] The order also found that there was evidence that a number of Partnership Entities appear to have had similar Partnerships, which could be attempts to engage in similar activities.

3. In the Partnership Gaming Order, the Commission directed the identified entities, in a trial-type evidentiary hearing to be held before an administrative law judge (ALJ), to show cause why their behavior, as set forth in the order, during the period January 1, 2000 to June 20, 2001 does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs. Further, the Commission directed the ALJ to hear evidence and render findings and conclusions quantifying the full extent to which the identified entities may have been unjustly enriched as a result of their conduct, and to recommend a monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.

### Motions to Dismiss

4. As the result of Commission Trial Staff's investigation, which included examining data responses, conducting conferences, and examining the ISO's submissions, Trial Staff filed motions to dismiss and requests to terminate Docket Nos. EL03-185-000, EL03-187-000, EL03-188-000, EL03-189-000, EL03-190-000, EL03-192-000, EL03-197-000, and EL03-202-000.

5. The Colorado River Commission of Nevada (CRC) separately filed a motion to dismiss in Docket No. EL03-184-000.

6. Sempra Energy Trading Corporation (SET) separately filed a motion to dismiss in Docket No. EL03-201-000.

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[2] The Partnership Gaming Order adopted the definitions of Gaming Practices stated in American Electric Power Service Corporation, et al., 103 FERC ¶ 61,345, reh'g denied, 106 FERC ¶ 61,020 (2003) (Gaming Practices Order), which was issued contemporaneously.

**Responses**

7. Several parties filed responses to the motions to dismiss. The responses will be discussed below. Some parties submitted answers to answers. The answers to answers will be discussed below.

**Discussion**

**Procedural Matter**

8. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), prohibits answers to answers unless specifically permitted by the decisional authority. We will permit the answers because they provided information that has assisted us in our decision-making process.

**Trial Staff Motions to Dismiss and Answers/Responses**

**Docket No. EL03-185-000 – Constellation Power Source, Inc.**

**Motion to Dismiss**

9. In the Partnership Gaming Order, the Commission stated that Constellation Power Source, Inc. (CPS), along with a number of other entities, appeared to have engaged in a partnership, alliance or other arrangement with Public Service Company of New Mexico (PSNM), and established Docket No. EL03-185-000.[3] The order suggested that CPS may have used parking arrangements with PSNM to facilitate False Import.[4]

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[3] See id.at P 43.

[4] Id. at P 45. In an order issued contemporaneously with the Partnership Gaming Order, the Commission described how a party could execute a False Import. It said:

> The essence of the False Import practice was to "park" day-ahead or day-of California energy with a company outside of California, buy it back for a small fee and then sell it to the ISO as "imported" out-of-market power. When power was parked under this practice, no power actually left the state of California. The reason for creating this fictional import was to take advantage of the fact that the ISO was making out-of-market purchases that were not subject to the price cap during real time whenever there was insufficient supply bid in its market. The ISO buyers responsible for obtaining the energy needed in the real-time market were willing to pay a price above the cap for energy imported from outside of California and accepted offers from sellers engaging in the False Import practice.

See Gaming Practices Order, 103 FERC ¶ 61,345 at P 38.

10. Trial Staff filed a motion to dismiss the show cause proceeding against CPS subject to the conditions that CPS and the California Parties agreed to, as memorialized in a December 5, 2003 letter agreement.[5]

11. Trial Staff states that, based upon its review of the record and meetings with CPS, CPS did not engage in False Import. According to Trial Staff, CPS purchased power during the relevant time period in the day-ahead and forward markets that was typically packaged in 16-hour blocks. As the date of delivery approached, CPS adjusted its portfolios to the realities of the market and the changing need of its customers in preparation for scheduling power. The power that was not booked-out went to physical delivery to serve load in real-time. Because load does not consume power in the exact 16-hour block increments that are the standard transaction increment in the day-ahead and forward markets, CPS used its parking arrangement with PSNM to convert the power into the size blocks desired by the market.

12. Trial Staff also points out that all of the electricity that CPS parked with PSNM in 2000 and 2001 was bought and sold at Palo Verde and Mead; thus the power could have been generated anywhere in the Western Interconnection, not just in California's day-ahead or day-of markets, a threshold requirement of a False Import. Trial Staff further asserts that when CPS makes the purchase it does not know the location of the generator, which could be in or outside of California. Trial Staff also points out that the power subject to the parking arrangement that CPS sold into the ISO's real-time market was sold at or below the applicable price cap.

13. Finally, Trial Staff supports its motion to dismiss by pointing out that the ISO did not include CPS on the list of entities having engaged in a Gaming Practice; the Commission did not include CPS in the show cause proceeding established by the Gaming Practices order; and the California Parties have formally agreed not to oppose the motion to dismiss.[6]

**Response**

14. PSNM filed a response in support of Trial Staff's motion to dismiss. In addition, PSNM argues that the gaming practice allegations against it in Docket No. EL03-185-000, arising from its transactions with Constellation should also be dismissed.

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[5] The December 5 letter agreement sets out the same responsibilities and conditions agreed to by the California Parties and MIECO, Inc. in Docket No. EL03-192-000, and are described below.

[6] Trial Staff notes that the motion and the December 5 letter agreement resolve the issues of this docket as well as any rehearing that CPS has pending.

**Docket No. EL03-187-000 – El Paso Merchant Energy, L.P.**
**Motion to Dismiss**

15. In the Partnership Gaming Order, the Commission determined that El Paso Merchant Energy, L.P. (EPE) appeared to have engaged in a partnership, alliance, or other arrangement with PSNM, cited to the California Parties' witness' Dr. Fox-Penner's testimony, which discussed the use of parking to facilitate False Import and established Docket No. EL03-187-000.[7]

16. After examining the record, including EPE's response to the show cause order, Trial Staff concluded:

> Because a False Import by definition requires an entity to pretend to move power out of California, and because El Paso Merchant Energy [EPE] never parked power from California with PNM, [EPE] could not have engaged in a False Import transaction through its parking arrangement with PNM.

Trial Staff Motion at P 3.3.

17. As a result of these findings Trial Staff filed a motion to dismiss EPE from the show cause proceeding and to terminate Docket No. EL03-187-000.

**Response**

18. PSNM filed a response in support of the motion to dismiss and terminate the docket.

**Docket No. EL03-188-000 – Eugene Water & Electric Board**

**Motion to Dismiss**

19. In the Partnership Gaming Order, the Commission determined that Eugene Water & Electric Board (Eugene) appeared to have engaged in a partnership, alliance, or other arrangement with Sempra Energy Trading Services Corporation (SET) to facilitate False Import and established Docket No. EL03-188-000.[8]

20. After examining the record, including Eugene's response that also admitted to providing parking services to Aquila Merchant Services, Inc. (Aquila), Trial Staff concluded that the parking services provided to Aquila or SET from May 2000 through October 2000 involved power exported from California. For transactions executed after

[7] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43.

[8] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43.

October 2, 2000, except for a small portion of one transaction, none of the parking transactions involved power exported from California that was resold into the ISO markets at a price above the applicable price cap, from January 1, 2000 to June 10, 2001. Trial Staff noted that the one exception involved a transaction with Aquila in which only a portion of the transaction resulted in $47.31 in revenues above the relevant price cap.[9]

21. Trial Staff therefore filed a motion to dismiss the show cause proceeding against Eugene because the transactions in question did not meet the Commission's definition of False Import. Trial Staff also requests that Docket No. EL03-188-000 be terminated.

**Docket No. EL03-189-000 – Idaho Power Company**

**Motion to Dismiss**

22. In the Partnership Gaming Order, the Commission determined that Idaho Power Company (IPC) appeared to have engaged in a partnership, alliance, or other arrangement with PSNM to facilitate False Import and established Docket No. EL03-189-000.[10]

23. After examining the record, including IPC's response to the show cause order, Trial Staff concluded that the parking/lending contracts between IPC and PSNM during the relevant time period were not for energy deliveries to California; instead these transactions were part of a strategy to help bring less-expensive power from the Southwest into the Pacific Northwest by wheeling it through the ISO.[11]

24. As a result of these findings Trial Staff filed a motion to dismiss IPC from the show cause proceeding and to terminate Docket No. EL03-189-000.

**Responses**

25. The California Parties state that, given the "narrow confines of this consolidated show cause proceeding, the California Parties do not object to the motion to dismiss the show cause proceeding as to [IPC]."[12] The California Parties request that the

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[9] See Trial Staff Motion at P 3.3.

[10] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43.

[11] See Trial Staff Motion at P 3.3.

[12] The California Parties reiterate their objection to what they characterize as the "piecemeal approach" employed by the Commission to address gaming. They object to the scope of the Commission's definitions of the gaming activities as well as the Commission's decision not to investigate certain gaming activities. See California Parties Motion at 4.

Commission clarify that: (1) if the scope of the proceedings is enlarged, then the California Parties will not be precluded from advocating or the Commission from applying any newly imposed rules, standards, or remedies to IPC; (2) dismissal does not resolve any issues raised in other dockets or in other Trial Staff investigations (both docketed and un-docketed); (3) if evidence of other harmful trading strategies on the part of IPC is presented, this docket will be reopened for consideration of appropriate remedies; and (4) dismissal of this docket does not preclude the Commission from ordering any appropriate remedy as to IPC or others in any other proceeding.

26. IPC filed an answer opposing the California Parties' request.

**Docket No. EL03-190-000 – Koch Energy Trading, Inc.**

**Motion to Dismiss**

27. In the Partnership Gaming Order, the Commission determined that Koch Energy Trading, Inc. (Koch) appeared to have engaged in a partnership, alliance, or other arrangement with PSNM to facilitate False Import and established Docket No. EL03-190-000.[13]

28. Trial Staff reviewed the record, including a letter agreement dated December 3, 2003, between Koch and the California Parties, where the California Parties agreed not to contest Trial Staff's motion in return for concessions made by Koch that would facilitate future discovery and/or future charges against Koch, if the scope of the show cause proceedings are expanded.[14]

29. Trial Staff concluded that during the period May 2000 through September 2000, plus one additional day identified by Koch subsequent to its July 31, 2003 show cause response, the energy parked with PSNM on 9 out of 12 relevant days was generated outside of California and thus, by definition, cannot be False Import. Trial Staff also points out that for the remaining 3 days, some of the power Koch parked with PSNM was purchased in the California Over-the-Counter Market, but Koch never bought power in the day-ahead market or the day-of markets from the PX. Nor did Koch park that power and sell that parked power in the California hourly market; neither did Koch sell power at out-of-market prices in excess of the ISO price caps for any of the parked power that it sold to the ISO.

[13] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43.

[14] The conditions that Koch agreed to are the substantially similar to the conditions that PPM Energy agreed to in Docket No. EL03-197-000 and that are discussed below.

30. Trial Staff, based upon its review and the parties' agreement, requests that the show cause proceeding against Koch be dismissed and that Docket No. EL03-190-000 be terminated, subject to the conditions of the parties' agreement.

**Docket No. EL03-192-000 – MIECO, Inc.**

**Motion to Dismiss**

31. In the Partnership Gaming Order, the Commission determined that MIECO, Inc. (MIECO) appeared to have engaged in a partnership, alliance, or other arrangement with PSNM to facilitate False Import and established Docket No. EL03-192-000.[15]

32. After examining the record, Trial Staff filed a motion to dismiss the False Import allegations against MIECO. Trial Staff bases its motion to dismiss on the evidence that MIECO entered into two successive parking/lending arrangements with PSNM. The parking arrangement with PSNM was used only once and Trial Staff concludes that MIECO's use of its parking rights with PSNM, on that single day, involved energy that was generated outside of California and thus, by definition, cannot be False Import. At other times when the contracts were in effect, MIECO remarketed its contractual rights to Sempra Energy Trading Corporation (SET) and PGE Trading Corporation (PGET). As scheduling agent (SC) for SET or PGET, MIECO was unaware of the prices paid by SET or PGET or the prices at which they sold the energy in question. In addition, during the days in which MIECO served as SC for SET and PGET, the ISO did not purchase Out of Market power at a price above the cap.

33. Trial Staff notes that MIECO and the California Parties have reached an agreement (described below) that imposes reasonable conditions on MIECO's dismissal from the show cause proceeding. Trial Staff requests that the Commission condition any dismissal of MIECO in a manner consistent with that agreement.

**Responses**

34. The California Parties filed a response that does not oppose the motion to dismiss on the merits, on the conditions that MIECO remain a party to the proceedings by becoming an intervener and be subject to discovery. The California Parties further condition their lack of opposition to the dismissal on MIECO agreeing that: (1) if the scope of the proceedings is enlarged, then the California Parties will not be precluded from advocating or the Commission from applying any newly imposed rules, standards, or remedies to MIECO; (2) dismissal does not resolve any issues raised in other dockets or in Trial Staff investigations (both docketed and un-docketed); and (3) dismissal of this

[15] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43.

docket does not preclude the Commission from ordering any appropriate remedy as to MIECO or others in any other proceeding.[16]

35. PSNM filed a response in support of Trial Staff's motion to dismiss. In addition, PSNM argues that the gaming practice allegations against it in Docket No. EL03-200-000, arising from its transactions with MIECO should also be dismissed.

**Docket No. EL03-197-000 – PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing, Inc.)**

**Motion to Dismiss**

36. In the Partnership Gaming Order, the Commission determined that PPM Energy, Inc. (f/k/a/ PacifiCorp Power Marketing, Inc.) (PPM Energy) appeared to have engaged in a partnership, alliance, or other arrangement with PSNM to facilitate False Import and established Docket No. EL03-197-000.[17]

37. After examining the record, Trial Staff filed its motion to dismiss the False Import allegations against PPM Energy. Trial Staff supports the motion to dismiss by stating that the record reveals several reasons why PPM Energy did not engage in any False Import strategy under the Exchange Agreement that it had with PSNM. Trial Staff points out that: (1) none of the transactions took place during the relevant time period (May 1 to October 1, 2000)[18]; (2) PPM Energy did not purchase any of the power it "parked" with PSNM in the California day-ahead or day-of markets, nor did it export any purchased power out of the state; (3) since all of the transactions took place in January 2000, none of them were "above the cap"; and (4) apparently PPM Energy incurred an overall loss as the result of these transactions.[19]

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[16] The California Parties' response is a letter agreement between it and MIECO, dated November 19, 2003. In that letter, MIECO agrees to certain conditions in exchange for the California Parties not opposing the motion to dismiss.

[17] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43. The Commission originally named PacifiCorp as the show cause respondent, but it later granted a motion to designate PPM Energy as the appropriate show cause respondent. Aquila Merchant Services, Inc., et al., 104 FERC ¶ 61,222 (2003), reh'g denied, 105 FERC ¶ 61,339 (2003).

[18] See Gaming Practices Order, 103 FERC ¶ 61,345 at P 40 n.55.

[19] See Trial Staff Motion at P 3.3.

38. Trial Staff notes that PPM Energy furnished it with a copy of a letter agreement it entered into with the California Parties. According to that agreement, the California Parties will not oppose this motion to dismiss if PPM Energy agrees: (1) to use its best efforts to provide full and complete responses to discovery from the California Parties under the schedule previously established; (2) that if the scope of this or any related proceeding is enlarged, then the California Parties will not be precluded from advocating or the Commission applying any newly imposed rules, standards or remedies on PPM Energy; (3) that dismissal from the Partnership Gaming Practices Proceeding will not resolve any issues in or otherwise raised in certain pending dockets or in any Trial Staff investigations (docketed or un-docketed); and (4) that PPM Energy's dismissal as a respondent in this proceeding will not preclude the Commission from imposing any appropriate remedy as to PPM Energy or others in any other proceeding.

39. Trial Staff therefore requests that the Commission dismiss PPM Energy from the show cause proceeding, terminate the docket, and relieve PPM Energy of any further obligation with respect thereto, subject to the conditions contained in PPM Energy's December 2, 2003 agreement with the California Parties.

**Response**

40. PPM Energy filed an answer in support of Trial Staff's motion to dismiss.

**Docket No. EL03-202-000 – TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc.**

**Motion to Dismiss**

41. In the Partnership Gaming Order, the Commission determined that TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc. (collectively, TransAlta) appeared to have engaged in a partnership, alliance, or other arrangement with PSNM to facilitate Circular Scheduling and established Docket No. EL03-202-000.[20]

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[20] Circular Scheduling or Death Star is described in the Gaming Practices Order:

> The Circular Scheduling practice involved the market participant scheduling a counterflow in order to receive a congestion relief payment. In conjunction with the counterflow, the market participant scheduled a series of transactions that included both energy imports and exports into and out of the ISO control area and a transaction outside the ISO control area in the opposite direction of the counterflow back to the original place of origin. With the same amount of power scheduled back to the point of origin, however, power did not actually flow and congestion was not relieved.

(cont.)

42. After examining the record, Trial Staff filed its motion to dismiss the False Import allegations against TransAlta. According to Trial Staff, the evidence shows that: (1) there were two separate parking contracts between TransAlta and PSNM that were applicable for a portion of the period between January 1, 2000 and June 20, 2001; (2) the parking transactions were intended to facilitate TransAlta acquiring energy at the Palo Verde or Four Corners trading hubs in the Southwest to satisfy sales commitments which TransAlta made or expected to make in the Pacific Northwest; (3) the ability to park with PSNM was necessary because a portion of the transmission path was controlled by the ISO and transmission over the ISO-controlled transmission lines was frequently constrained and transmission over these lines could not be confirmed until after the day-ahead scheduling deadline at Palo Verde and Four Corners had expired; and (4) in contrast to Enron-type strategies, energy actually flowed in TransAlta's transactions, and the ISO actively sought TransAlta's assistance in moving energy across California. Trial Staff therefore requests that the Commission dismiss the show cause proceeding against TransAlta and terminate the docket.

**Responses**

43. The ISO filed a response opposing the motion to dismiss. According to the ISO, Trial Staff's review of the materials furnished by TransAlta, without subjecting TransAlta to compulsory discovery and its witnesses to cross-examination, is not a sufficient basis upon which to dismiss the proceeding on the merits. Alternatively, the ISO requests that, if the Commission does relieve TransAlta of the obligation to submit its response to the Partnership Gaming Order, the docket remains open with TransAlta remaining a party, subject to discovery if it has information relevant to potential gaming of other parties.

44. The California Parties filed a response in opposition to the motion to dismiss. They assert that there are material issues of fact, thus the Commission cannot conclude that, as a matter of law, the relevant filings, having been afforded every reasonable favorable inference, are inadequate to make out a prima facie case with respect to the allegations at issue.[21]

45. The California Parties assert that TransAlta's evidence that its parking arrangement with PSNM was not intended to facilitate a Circular Scheduling strategy is inconsistent with the evidence that they submitted that parking arrangements, like those between TransAlta and PSNM, were used to facilitate Ricochet transactions.[22]

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See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43.

[21] See California Parties Response at 5 and cases cited therein.

[22] See California Parties Response at 7, citing Dr. Fox-Penner's testimony in Exh. No. CA-1 at 125 (quoting Exh. No. CA-82 at 34).

46. The California Parties argue that there has been insufficient time allocated for discovery especially since this motion to dismiss was filed prior to any discovery being allowed in the show cause proceeding. They argue that the 100 Days evidence is inadequate for a dismissal based upon the specific acts of seller misconduct.

47. The California Parties renew their objection to the approach employed by the Commission in response to the widespread and serious gaming activities of the sellers.

48. Alternatively, the California Parties request that if the motion to dismiss is granted that the Commission clarify the dismissal in the same way that they request in Docket No. EL03-189-000.

**Commission Determination Concerning Trial Staff Motions**

49. We will grant Trial Staff's motions to dismiss. We agree with Trial Staff's assessment of the record in each docket and find that the respondents did not engage in prohibited gaming practices, as defined in the Gaming Practices Order, during the relevant time period.[23] Moreover, some of the motions were not opposed, other motions were not opposed subject to certain agreed-upon conditions, and in other instances the opposition was in reality restatements of the requests for clarification/rehearing of the Partnership Gaming Order and as such, is not appropriately addressed here.[24]

50. The California Parties have requested that we clarify that: (1) if the scope of the proceedings is enlarged, then they will not be precluded from advocating or the Commission from applying any newly imposed rules, standards, or remedies to any entity

[23] We are not persuaded by the California Parties' allegations, see supra P 45, that their evidence shows that TransAlta and PSNM engaged in activities that constituted Gaming Practices. The facts presented by TransAlta demonstrate that the parking transactions with PSNM were used to facilitate scheduling of transmission service to move energy purchases in the Southwest to serve load in the Northwest. A component of the transmission path used ISO controlled facilities. Transmission service from the ISO was confirmed after the point in time when TransAlta was required to schedule its day-ahead energy transactions. The parking service with PSNM was the method that TransAlta used to bridge the gap in time between the preschedule deadline and the time that transmission was confirmed by the ISO. The TransAlta records demonstrate that 93% of the energy purchased in the Southwest was transmitted to the Northwest. The data also indicates that to the limited extent that transmission was not available in all segments of the transmission path, TransAlta incurred a net loss and the energy was not sold in the California market. Therefore, these parking transactions were not used to facilitate Gaming Practices..

[24] As noted above, an order denying these rehearing requests is being issued contemporaneously in Docket No. EL03-180-000, et al.

that has had its docket dismissed; (2) dismissal does not resolve any issues raised in other dockets or in other Trial Staff investigations (both docketed and un-docketed); (3) if evidence of other harmful trading strategies on the part of any entity that has had its docket dismissed is presented, then that docket will be reopened for consideration of appropriate remedies; and (4) dismissal of any docket does not preclude the Commission from ordering any appropriate remedy as to the entity that is the subject of the dismissed docket or others in any other proceeding.

51. We agree to the California Parties' requested clarifications 1, 2, and 4 outlined above. However, we deny the requested clarification 3, because the request is in essence a request for rehearing or a collateral attack on our decision in the Partnership Gaming Order as to what trading strategies would be addressed in these proceedings.

52. We will therefore dismiss the above show cause proceedings against the respondents[25] and terminate the dockets.[26] However, the parties that agreed to certain conditions in exchange for the California Parties' not objecting to the motions to dismiss will be required to honor those agreements.

**Other Parties' Motions to Dismiss**

**Docket No. EL03-184-000 – Colorado River Commission of Nevada**

**Motion to Dismiss**

53. The Colorado River Commission of Nevada (CRC) filed a motion to dismiss the show cause proceeding against it and to terminate Docket No. EL03-184-000. CRC notes that it has requested rehearing of the Partnership Gaming Order on a number of grounds, including the Commission's lack of jurisdiction over CRC, as a governmental entity. CRC incorporates by reference its arguments on rehearing regarding the Commission's lack of jurisdiction.

[25] While we are not in this order dismissing the show cause proceeding against PSNM in Docket No. EL03-200-000, we will limit the scope of that proceeding to partnership gaming practices that may have occurred between PSNM and entities whose show cause dockets have not been dismissed.

[26] We deny the requests that the dockets be kept open so that the respondents remain subject to discovery as parties. Keeping the respondents "on the hook" for discovery after they no longer are parties and no longer have an interest in the proceeding is unfair and onerous. In any event, the Commission's rules of discovery are sufficient to provide parties with a means to discover information from non-parties, should that prove necessary or appropriate. See 18 C.F.R. §§ 385.404, 385.409 (2003).

54. CRC states that it filed this motion to dismiss in light of the Commission's recent decision on rehearing in San Diego Gas & Electric Company (Complainant) v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange (Respondents), 105 FERC ¶ 61,066 (2003) (SDG&E). According to CRC, the Commission correctly determined that it did not have jurisdiction over certain sales transactions between the Public Utility District No. 2 of Grant County, Washington (Grant County) and the ISO. CRC points out that Grant County: (1) is a governmental entity whose only transactions involving the ISO were negotiated sales under a standard form contract prepared by the Western Systems Power Pool, not the ISO tariff; (2) made no sales under the ISO tariff into the ISO's centralized, single clearing auction markets; and (3) did not sign a Scheduling Coordinator Agreement or Participating Generator Agreement with the ISO.[27]

55. CRC argues that its transactions involving the ISO are indistinguishable from the Grant County transactions, and, the Commission should dismiss the show cause proceeding against it and terminate the docket. CRC asserts that it: (1) did not enter into any agreements with the ISO; (2) is not a signatory to the Scheduling Coordinator Agreement applicable to the ISO markets; (3) did not enter into any agreements with the PX; and (4) did not conduct any wholesale power transactions under either the ISO or PX tariffs into the ISO's or PX's organized markets at any time. According to CRC, the only transactions it had that were related to the ISO's and PX's markets were sales through other parties (e.g., through Enron Power Marketing, Inc.)[28]

**Responses**

56. Nevada Power Company and Sierra Pacific Power Company (collectively, Nevada Companies) filed an answer opposing CRC's motion to dismiss. The Nevada Companies argue that the motion to dismiss should be denied because the Commission based its finding of lack of jurisdiction over Grant County on the fact that the only markets in which Grant County was a participant were not the centralized ISO or PX markets at issue. They assert that CRC – unlike Grant County – entered into scheduling coordinator agreements[29] to enable the buying and selling of capacity and energy between itself and

[27] See CRC Motion at P 5, citing SDG&E, 105 FERC ¶ 61,066 at 61,243.

[28] See CRC Motion at P 7, citing CRC testimony of Gail Bates, Exhibit CRC-1 at 3-4.

[29] The Nevada Companies point out that CRC denies having entered into a partnership, alliance or similar relationship with Enron, but admits to an arrangement where proceeds from transactions that Enron made in the ISO and PX markets on CRC's behalf were shared. They point out that Ms. Bates testified to a "scheduling coordinator" arrangement with Enron while acknowledging written documentation only as to bilateral trading enabling agreements. They also note that Ms. Bates testified that CRC confirmed that it trusted and relied upon Enron's accounting records rather than its own, to (cont.)

the ISO and PX centralized markets. The Nevada Companies point out that evidence provided by CRC is replete with references as to how it participated in the ISO and PX centralized markets during the relevant time period.[30]

57. The Nevada Companies request denial of the motion to dismiss because, in sum, CRC clearly was a market participant engaged in transactions over which the Commission has jurisdiction regardless of whether CRC conducted its transactions through a "straw-man" or not.

58. The California Parties filed a response opposing CRC's motion to dismiss. They assert that CRC is not like Grant County. The California Parties argue that since CRC actively participated in the ISO and PX centralized markets and derived substantial benefits from that participation due in part, to its alliance with Enron, it is properly a show cause respondent.

59. Trial Staff also filed an answer opposing CRC's motion to dismiss. Trial Staff's opposition is based on the same arguments made by the Nevada Companies and the California Parties.

**Commission Determination**

60. We will deny CRC's motion to dismiss. CRC's reliance on our decision on rehearing in SDG&E is misplaced. In that order, the Commission held that it did not have jurisdiction over Grant County. However, unlike Grant County which had a discrete relationship with the ISO that did not involve making sales under the ISO tariff into the ISO's centralized, single price auction markets or any arrangement with the ISO (i.e., a Scheduling Coordinator Agreement or a Participating Generator Agreement, which specifically acknowledged our jurisdiction regarding its ISO sales),[31] the record is replete with testimony provided by CRC that shows that CRC participated in the ISO and PX markets at issue in this proceeding with or through Enron and that it benefited financially from this arrangement.[32] We thus find that CRC's assertion that it had not entered into a partnership, alliance or similar relationship with Enron, evidently because

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determine the profitability of Enron's deals and thus the basis for the equitable sharing of proceeds from ISO or PX transactions. See Nevada Companies Response at 5 n.21, citing Bates Affidavit at 14-15, 19.

[30] See Nevada Companies Response at 8 nn.32-37, citing CRC's Answer to Show Cause in EL03-180-000 et al., at 7 and Bates Affidavit at 8, 9, 10, 13.

[31] See SDG&E, 105 FERC ¶ 61,066 at P 177.

[32] See the record references cited in the Nevada Companies' Response at 4-8.

there is no written documentation, is unavailing. The Partnership Gaming Order did not limit the show cause inquiry to signatories of written agreements. We continue to find that we have jurisdiction over CRC and that it must participate in Docket No. EL03-184-000 and fully comply with the show cause order.

**Docket No. EL03-201-000 – Sempra Energy Trading Corporation**

**Motion to Dismiss**

61. SET filed a motion requesting that the Commission dismiss the show cause proceeding claim that SET and Coral Power LLC (Coral) worked in concert to engage in Gaming Practices in violation of the ISO and PX tariffs.[33]

**Commission Determination**

62. SET and Trial Staff have reached an Agreement and Stipulation (Agreement) in this docket and Docket No. EL03-173-000. The Agreement, which was filed on October 31, 2003 (and is presently pending), provides, among other things:

> 4.6 The proceedings in Docket Nos. EL03-173-000 and EL03-201-000 shall be dismissed with prejudice, and, except as may be necessary to carry out the provisions of this Agreement, those proceedings shall be terminated.

63. In light of this pending Agreement, we need not address the merits of SET's motion to dismiss at this time because the motion will be moot should the Agreement be approved.

The Commission orders:

(A) Trial Staff's motions to dismiss are hereby granted, but the parties remain subject to the conditions agreed upon, as discussed herein.

(B) Docket Nos. EL03-185-000, EL03-187-000, EL03-188-000, EL03-189-000, EL03-190-000, EL03-192-000 EL03-197-000 and EL03-202-000 are hereby terminated.

[33] See Partnership Gaming Order, 103 FERC ¶ 61,346 at P 43.

(C) CRC's motion to dismiss in Docket No. EL03-184-000 is hereby denied for the reasons stated herein.

By the Commission.

( S E A L )

Magalie R. Salas,
Secretary.